Randell Manufacturing of Arizona, Inc. *and* Sheet Metal Workers' International Association, Local No. 359, AFL–CIO. Case 28–CA–16207 and 28–CA–16322

August 26, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 5, 2001, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Randell Manufacturing of Arizona, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that the complaint allegations of unlawful solicitation of grievances and threat of replacement are time barred by Sec. 10(b). We agree with the judge that the allegations are not closely related to the timely filed charge concerning Perez' discharge. We do not rely, however, on the judge's reasoning that the untimely filed charges did not involve the same legal theory as the discharge because the allegation that the discharge violated Sec. 8(a)(3) lacked merit.

We agree with the judge, for the reasons stated in his decision, that *Ross Stores, Inc.*, 329 NLRB 573 (1999), enf. denied in relevant part 235 F.3d 669 (D.C. Cir. 2001), is distinguishable. Chairman Battista and Member Schaumber express no opinion on whether *Ross Stores* was correctly decided.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by terminating Luz del Carmen Perez for engaging in protected, concerted activity when she circulated a petition requesting the removal of her supervisor, Ismael Garcia. The Respondent's asserted reason for discharging Perez was excessive absenteeism. The Respondent contends that Perez incurred her 11th and final absence when she failed to show up for a scheduled inventory on Saturday, October 30, 1999, thereby mandating her discharge under the Respondent's strict attendance policy. The judge rejected this explanation, as do we. The judge credited Perez' testimony that she did not commit to work on October 30, and specifically discredited Garcia's contrary testimony that Perez agreed *unconditionally* to work that day. This credibility resolution is consistent with the record as a whole. When Garcia approached Perez about working the Friday, October 29 inventory, Perez called her home to check on her childcare situation and then told Garcia that she could not work because she did not have a babysitter for her children. Perez' mother, the children's usual sitter, left the country on Friday afternoon. Garcia accepted this response and then asked Perez if she could work on Saturday. Perez told Garcia that she could work on Saturday only if she could get her neighbor to babysit her children. Perez testified that her husband was unavailable to watch the children on Saturday because he was working. In light of the uncertainty of Perez' childcare arrangements, and given that she knew she might face disciplinary action for an unexcused no-show, we cannot conclude that the judge erred in crediting Perez' testimony over Garcia's.

Additionally, Garcia was not universally rigid in his application of the Respondent's attendance policy. Employees Antonio Valencia and Carlos Chavez were scheduled to work the Friday inventory and Garcia was instructed to excuse them only if replacements could be found. Yet even though Garcia knew that Perez could not work on Friday and he had not lined up other replacements, he did not require Valencia and Chavez to report. Nor did he discipline them for declining to do so. The Respondent contends that Garcia strictly and consistently applied the company's attendance policy, but fails to explain the leniency accorded to Valencia and Chavez. For these reasons, in addition to those cited by the judge, we agree the discharge of Perez violated Sec. 8(a)(1).

There are no exceptions to the judge's dismissal of the allegation that Perez' discharge also violated Sec. 8(a)(3).

[3] We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

Dated, Washington, D.C. August 26, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees who engage in activity for their mutual aid and protection, such as joining with other employees to ask that their supervisor be replaced.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's order, offer Luz del Carmen Perez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Luz del Carmen Perez whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Luz del Carmen Perez and WE WILL, within 3 days thereafter, notify her in writing that his had been done and that the discharge will not be used against her in any way.

RANDELL MANUFACTURING OF ARIZONA, INC.

Richard A. Smith and *Mitchell S. Rubin*, for the General Counsel.

Tibor Nagy and *Robert C. Daum (Snell & Wilmer)*, of Tucson, Arizona, for the Respondent.

José P. Otero, Organizer, of Tucson, Arizona, for Sheet Metal Workers Local No. 359.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Tucson, Arizona, on August 22–24, and October 5, 2000, on a complaint issued on March 31, 2000, by the Regional Director for Region 28. The complaint is based on unfair labor practice charges filed by Sheet Metal Workers' International Association, Local No. 359, AFL–CIO, on December 2, 1999,[2] and February 9, 2000. It alleges that Respondent, Randell Manufacturing of Arizona, Inc., has violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). Respondent denies the allegations.

Issues

This case presents issues under Section 8(a)(1), (3), and (5) of the Act. All of the conduct is alleged to have occurred shortly after the Board issued its certification of representative to the Union on July 27, 1999. That certification concerned a representation election conducted in February 1995.[3] In order to test the certification, Respondent refused to bargain, the Union filed unfair labor practice charges, and a summary judgment followed on March 20, 2000.[4]

Among other things Respondent is alleged to have promulgated an overly broad and discriminatory rule prohibiting employees from talking during working time,[5] soliciting employee grievances during a company meeting to explain why Respondent was challenging the certification, and threatening employees with replacement. The General Counsel also accused Respondent of unilaterally, without notice to the Union, implementing an incentive for improvement program,[6] and increasing its production requirements. Finally, the General Counsel contends that Respondent discharged its employee Luz del Carmen Perez (Perez) on November 1, 1999, either because of her union activities or because she had engaged in the concerted protected activity of seeking to replace her supervisor. Respondent denies the remaining allegations in the complaint and also asserts that the 8(a)(1) allegations concerning the solicitation of grievances and the threat of replacement are timebarred by Section 10(b) of the Act.

Both the General Counsel and Respondent have filed briefs[7] which been carefully considered. Based on the entire record,

[2] All dates are in 1999 unless otherwise indicated.

[3] See *Randell Warehouse of Arizona*, 328 NLRB 1034 (1999).

[4] See *Randell Warehouse of Arizona*, 330 NLRB 914 (2000).

[5] The no talking rule was dismissed on the record for lack of evidence.

[6] The General Counsel withdrew the allegation concerning the incentive for improvement program at the hearing on August 22, 2000.

[7] On January 24, 2001, Respondent filed a copy of a week-old court decision denying enforcement of a case upon which the General Coun-

including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation operating a manufacturing plant in Tucson, Arizona. A subsidiary of Dover Industries, it is in the business of manufacturing restaurant equipment.[8] It admits that during the year preceeding December 2, 1999, it purchased and received at its Tucson facility products, goods, and materials valued in excess of $50,000 directly from points outside Arizona. Accordingly, it admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Furthermore, it admits that the Union is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

II. THE UNFAIR LABOR PRACTICES

A. Background and Sequence of Events

The Tucson operation has both corporate and local components. Albert DeLorenzo is the corporate official located at the site. He is the vice president for Arizona operations. However, the plant itself is run by the plant manager, John Halifax. Halifax makes the day-to-day decisions concerning the operations of the plant itself. He has a support staff including Lee Freeman, the human resources manager. He also has a number of first-line supervisors, including Ismael Garcia. Garcia is in charge of the refrigeration assembly lines. There are other supervisors for other departments or work cells. There are about 70–75 total employees at the plant. One of the areas which Garcia oversees is the plate chiller department which normally utilizes two employees to put that product together.[9] The two employees who assembled the plate chillers during this period were Jesus Vazquez and Carmen Perez.

Perez, whose discharge is in issue here, was hired on February 3. She is a Mexican national seeking permanent resident status in the United States. She speaks and understands very little English. At the time of her employment she was married and had three small children. During her employment she became pregnant with her fourth child. She was discharged on November 1.

With respect to the representation case, insofar as it concerns the 10(b) issue, the factual sequence is as follows: The election was held on February 3, 1995, with the tally showing that the Union had obtained majority status. Respondent filed timely objections which were not decided until July 27, 1999, almost 4-1/2 years later. Approximately a week after the Board ruled on the objections, certifying the Union as the 9(a) representative, Vice President DeLorenzo conducted a series of nearly-identical meetings with employees. All occurred on August 3 and primarily involved the reading of a notice explaining why Respondent had chosen to test the certification. DeLorenzo read (using an overhead projector) the notice which was later posted on the bulletin board. It is in evidence as GC Exh. 4. The complaint alleges it was during this meeting that DeLorenzo unlawfully solicited employee grievances. As one of the sections was breaking up, a first-line supervisor named Mark Gesquiere made a remark to a couple of departing employees which the complaint alleges to be an unlawful threat that they would be replaced if they went on strike. The unfair labor practice charge, Case 28–CA–16322, concerning these two allegations was not filed until February 9, 2000, and was not served on Respondent until the following day, February 10, 2000. That charge also included a claim that Respondent had engaged in some unilateral changes in the terms and conditions of employment which violated Section 8(a)(5).

An earlier unfair labor practice charge, however, Case 28–CA–16207, had been filed on December 2, 1999. That charge alleged only that Perez and another employee had been discharged for their union activities. It did not contain any allegations that Section 8(a)(1) had been independently violated. The complaint, as issued, alleged in the alternative that Perez had either been discharged for her union activity or for concerted protected activity independent of the Union. As shown below, that discharge was not for her union activity, but because she had instigated her fellow employees to complain in concert about their supervisor, Garcia, asking Respondent to replace him.

I note that the second unfair labor practice charge, relating to the August 3 conduct, was filed more than 6 months after the event.[10] Thus, the 10(b) period expired on February 5, 2000, 4 days before the charge alleging the specific violation was filed. It is literally time-barred unless circumstances provide an exception.

B. The 10(b) Defense to the 8(a)(1) Allegations Made in Case 28–CA–16322

Redd-I, Inc.[11] and *Nickles Bakery of Indiana*[12] hold that despite a literal failure to comply with the 6-month limitations period found in Section 10(b), a complaint may include such an allegation if it meets a three-part "closely related" test. Specifically, the Board considers the following factors: (1) whether

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sel was relying. The case had been decided 8 days previously and about 2 months after briefs were filed. The General Counsel filed a motion to strike asserting Respondent was making an improper effort to supplement its brief. The motion is denied as legally frivolous. It is entirely proper for counsel to report on the status of relied-upon precedent at any stage. Indeed, a knowing failure to do so shows a lack of candor and is unprofessional. Counsel for the General Counsel, rather than opposing the motion should have been notifying me themselves, or at the very least not filing an opposition. See fn. 14 for the case in question.

[8] More specifically, the plant produces refrigeration units such as beer coolers, reach-in refrigerators, and plate chillers; it also manufactures a variety of hot food tables and a dough roller.

[9] A plate chiller is a small refrigerator designed to chill salad plates which have been placed on a spring loaded tray for pickup by a server or customer.

[10] In pertinent part the limitations language of Sec. 10(b) reads: ". . . no complaint shall issue based upon any unfair labor practice charge occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . ."

[11] 290 NLRB 1115, 1118 (1988).

[12] 296 NLRB 927, 928 (1989).

the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the Respondent would raise similar defenses to both allegations.

Here, I must conclude that the late-filed charge does not meet the test. First, the allegations do not involve the same theory. Perez' discharge, covered by the initial unfair labor practice charge, is in the alternative. The viable theory is that she was discharged because she persuaded the employees on Garcia's staff to sign a petition aimed at persuading management to replace him, and that Garcia, when given an opportunity for a reprisal, took it. The alternate theory, that she was discharged for her union activities, was never viable, and the General Counsel knew it. To be viable, the charge required employer knowledge of her activity and, aside from Perez being one of many to wear a union T-shirt, there is no real proof that Respondent was aware of the strength of her feelings, that the Union had appointed her to be a committee member or that she had distributed union T-shirts in the parking lot on perhaps two occasions. She certainly didn't give testimony about any such knowledge, nor did anyone else. Second, evidence of union animus suggestive of a motive to discharge is nonexistent. The General Counsel relies, inappropriately, on Respondent's invocation of its statutory right to test the certification. However, using a congressionally approved means of challenging the certification, refusing to bargain, is not as a matter of law proof of animus.

And, while later, untimely-filed charges may be used as background evidence to support the discharge case,[13] their validity here, even as background, is dubious. It seems clear to me a supposed statement at a meeting in August which is alleged to be a solicitation of grievances and a second supposed statement which may or may not qualify as an accurate statement of law regarding strikers' replacement rights, have little to do with supporting a charge/complaint arising out of circumstances occurring in a November discharge. There is no real nexus, for the discharge is only faintly, if at all, connected to the Company's response to union organizing. As background, they certainly can't be used to bootstrap themselves into independent viability in the face of Section 10(b).

Nor do I read the Board's opinion in *Ross Stores*, 329 NLRB 573 (1999)[14] as a warrant to deny dismissal on 10(b) grounds. There, a divided Board allowed a late-filed charge to stand, despite a 10(b) objection, on the ground that the conduct was part of an overall campaign to thwart union organizing. In that case the dischargee was also the person to whom the late-filed coercion was directed, which is not true here. Furthermore, it cannot be said, at least at this stage, that Respondent has ever embarked on a campaign, much less an unlawful campaign, to avoid unionization. The election campaign was over 4-1/2 years before these incidents, the Union won the election and there is, on this record at least, no cognizable evidence of illegal conduct between then and 1999.[15] Moreover, no campaign of any kind can be seen to have begun or resumed in 1999. Clearly the same factual circumstances are not present and the defenses which Respondent must marshal are different as well. Therefore, *Ross* simply does not apply.

Accordingly, the 8(a)(1) allegations in the second case, Case 28–CA–16322, will be dismissed on procedural grounds. Section 10(b) bars them from being an independent cause of the complaint.

C. The Discharge of Luz del Carmen Perez

1. Postcertification events

Luz del Carmen Perez was hired on February 3 and discharged on November 1. The discharge, ostensibly, was because she breached the attendance rule, having acquired her 11th unexcused absence in a rolling year. That absence occurred when she did not appear for inventory work on Saturday, October 30.

Her first assignment after being hired was in the reach-in department. Shortly after that she was assigned to the refrigeration department and in June was put in the plate chilling area. There she inserted compressors into the unit after it had been assembled by her coworker Vazquez.

On August 3, Respondent conducted a meeting (in sections) of employees during which Vice President DeLorenzo advised that the Company was going to continue to oppose the NLRB certification in the courts. According to some witnesses he also remarked that the employees did not need a union (not alleged in any complaint or charge), that they would have to renegotiate their salaries and benefits if the Union came in (accurate), that employees would be throwing their money away if they joined the Union (lawful opinion; moreover, Arizona is a right-to-work-state where compulsory union membership is not permitted), and that employees could approach him with any problems and that he would attempt to resolve them [consistent with calling attention to the existence of the 'concern process' set forth in the employee manual, and alleged in the complaint to be unlawful grievance solicitation; barred by Section 10(b)].

As one section of that meeting was breaking up, according to employee Albert Gutierrez, a supervisor named Mark Gesquiere heard another employee, annoyed with DeLorenzo, remark to Gutierrez that the employees should go on strike. Gutierrez testified that Gesquiere replied something to the effect ". . . why don't you guys do that? All we have to do is replace you guys." [Depending on context, this remark may or may not have constituted an unlawful threat. *Eagle Comtronics*, 263 NLRB 515 (198[2]). Barred by Section 10(b) here].

2. The petition against Garcia

About Friday, August 13, Perez had become disenchanted with the supervisory style exhibited by Garcia. She wanted someone else to take his place. She decided that one way to do that was to obtain and circulate a signature petition designed for that purpose. She then created General Counsel Exhit 3. In its

[13] *Machinists Local Lodge 1424 v. NLRB* 362 U.S. 411 (1960).

[14] Enf. denied 235 F.3d 669, 674–675 (D.C. Cir. 2001).

[15] In August 1996, approximately 18 months after the election, Respondent instituted an in-house complaint procedure known as the "concern process." No unfair labor practice charges were filed regarding that event. While that may have amounted to an unfair labor practice, it is now well beyond the ken of the Act and can have no bearing on the facts before the Board here.

original form, it contained no English language below the signatures. She signed first at the top of the page, and then circulated the document for other signatures, explaining that it was for the purpose of replacing Garcia. Eventually, she obtained the signatures of seven other refrigeration department employees, all of whom worked on Garcia's line. She also had one of them who could write English to write at the bottom: "These signatures are because we want a change in supervisor, because we are not comfortable with him."

A few minutes later, she and another employee, a young man whose name she does not know but who speaks English,[16] took the petition to plant manager, John Halifax. Halifax read the petition and told the young man to tell Perez that if the employees had something to say to Garcia they should do it when Garcia returned. They left the petition in Halifax's possession.

Shortly thereafter, Halifax went to the refrigeration area and gathered the employees for a short meeting. During that talk he told them ". . . unless there was an issue brought to light in regard to a supervisor harassing individuals or something where they would have to go past the supervisor and go[ ] to a manager for assistance in the matter, then each of the people on that list, if they had an issue with their supervisor, they needed to utilize the concern process."

In essence, he told them he wasn't going to deal with their problem, that they had best take it up with Garcia, the very person about whom they had the complaint. That approach resulted in several of them saying that they had not understood the purpose of the petition and wanted their names removed from it.

None were removed and, either later that day or the following day, Halifax showed it to Garcia.

When Garcia initially testified about the petition, he twice said he first saw it in late October, on the Wednesday before the inventory which ended in Perez' discharge. He also confirmed it to me:

> JUDGE KENNEDY: You hadn't seen it [GC Exh. 3] before that?
>
> THE WITNESS: I don't recall whether I did or not, but I was aware of this, I believe when I came back from those two days [off during the week of October 25].

Later, he said he first saw the petition in August, asserting that he had somehow become confused earlier, thus, aligning his testimony with that of Halifax. I do not believe it makes much difference whether he first saw it in August or in October. He certainly seems to have seen it in October, perhaps for the second time, as he has a specific recollection of seeing it when he came back to work after a short absence that week.

Garcia, in describing his first response to seeing the petition, admits that he was "just shocked to see this." And, he simultaneously became aware that Perez' was the first signature on the list and that she was the principal employee behind the petition. (The young man who had accompanied her had clearly served as a translator; it is not clear that he was a signer.)

3. Union activity is renewed; Perez' involvement

The event following the August 13 petition concerning Garcia was an August 17 after-work meeting at a local park between three union officials and a group of about 22 employees. At this meeting the union officials explained their view of the certification as well as the consequences of Respondent's decision to challenge it. That was the first union meeting which Perez had attended. There also appear to have been two other union meetings which were conducted shortly thereafter. At one of the meetings the union officials asked Perez and employee Miguel Parra to serve as the Union's eyes and ears in the plant.

At about that time the preelection practice of employees wearing union T-shirts resumed and Perez, for the first time, began wearing one. She made it a practice to wear her union T-shirt each Wednesday. Similarly, her coworker Jesus Vazquez began wearing his even more frequently. And, many more employees wore the shirts as well. Twice, after work, she distributed about 10 T-shirts and union caps in the parking lot after work. She agrees that she has no knowledge concerning whether or not any of Respondent's managerial staff observed that distribution. Respondent, however, has stipulated, and both human resources manager, Lee Freeman, and her supervisor, Ismael Garcia, testified that they were aware that she was wearing the shirt.

There is no evidence, however, that Respondent was aware that the Union had appointed her as one of its inside people or that she should be regarded as one of its leading proponents. Furthermore, there is no evidence that any manager said anything to her about her union views and sentiments. Finally, there is no evidence that she reported any observations about the Company to the Union or that company officials thought she had. It is fair to say that in management's eyes she was one of a majority of employees who favored union representation. In a very real sense, she did not stand out from the crowd.

4. Perez' attendance record; the inventory absence

Respondent operates its factory under several rules. Its attendance rule on its face appears to be nondiscriminatory. It is called a "no-fault policy," and has the shortcomings of most woodenly applied rules. Without exploring all the nuances, the policy allows for 10 unexcused absences in a rolling year, with discharge being the only course available on the 11th. Aside from some very narrow exceptions (death in the family, prescheduled doctor's appointments, jury duty/court appearances, illness/injury after the first day, and various statutory requirements[17]) the policy is applied to all absences. This means that an absence is counted as unexcused no matter how sympathetic. Worse, the employee may not know that an absence has been counted as unexcused until the fifth and/or tenth absence when the supervisor will give him or her written notice that those milestones have been passed. Depending on the timing, it may

[16] Halifax testified that Perez was accompanied by a female employee Ana Samoniego. I believe him to be mistaken and credit Perez' testimony that she asked a young man to go with her. He spoke English and could communicate with Halifax. Perez says Samoniego does not speak English.

[17] "Circumstances of a general nature," usually referring to a situation affecting a large portion of the citizenry—e.g., floods, tornadoes, and the like, is another specific exception.

be too late to effectively rebut the demerit, even if it were possible. Thus, family emergencies (child/spouse taken to the emergency room) during the workday generally don't qualify as an excused absence.[18] It has been argued here that a first line supervisor doesn't even have the authority to give permission for an absence of this kind. And, entirely separate from the absence rule is the tardy/leave early rule.

As of the end of October, Perez had 10 unexcused absences. The General Counsel argues that three of them were unwarranted and should not have been counted. Aside from whether or not the Board can substitute its judgment for the employer's in these instances, there is no warrant to determine that any of them fall within the Board's purview unless they have been specially pled. Two of them are particularly appealing, however.

The first of the three, occurring July 6 and well before the certification, involved an appointment made for her by the Immigration and Naturalization Service (INS) for an interview to grant her permanent resident status. In this case, she promptly notified both her supervisor and the front office of the appointment, giving at least 10 days advance notice. Her notice was nearly identical to the notice which the rules required for a prescheduled doctor's appointment. Garcia had told her to go, Freeman wrote a letter to the INS on her behalf, yet she missed being considered a "leave-early," under Respondent's counting, by only her 30-minute-break period.[19] Given Respondent's policy toward maintaining a trained workforce, one wonders why the rule was applied so harshly here. This was closely akin to a court appearance. It was an INS request upon which her future depended and an appointment which had taken nearly 3 years to obtain. Such appointments are difficult to reschedule.

The second occurred on September 7 when her kindergartner suffered a medical emergency at school. Perez left work with Garcia's approval after her mother called her at work saying that the school nurse had reported the child had become very ill and needed to be taken to the hospital. Her absence was supported afterwards by an emergency room slip for the child. The third absence, less documented, was due to morning sickness which struck during the second or third hour of her shift on October 5 rendering her unfit to work. In this case she left after unsuccessfully trying to find Garcia, and left a message with Vazquez who did inform Garcia shortly thereafter. No one actually questions Perez' veracity, but the incident occurred without any written notice to the Company that she had become pregnant with her fourth child, though she had advised Garcia in August.

Therefore, as of October 29–30 she had reached her limit of unexcused absences. Garcia well knew it; he had conducted both a counseling meeting with her on October 6 and on October 8 had fended off her ensuing attempt to get Respondent to reconsider some of them, particularly the INS absence. He declined to take her request to the front office, and managed to halt her effort.

On Monday, October 25, Respondent posted an inventory work schedule. Because Garcia was off work during the first part of the week and unavailable for consultation, Halifax assigned refrigeration department employees in the same manner as they had been assigned during the most recent previous inventory. The work was to be done on Friday afternoon, from 3:30 to 6 p.m. and on Saturday from 6:30 a.m. until it was complete. Although inventory work is mandatory, two refrigeration department employees, Antonio Valencia and Carlos Chavez went to Halifax to tell him that they would be unable to perform it. He told them to discuss it with Garcia when he returned. On Wednesday, Halifax told Garcia of the problem, telling him he needed to have his area covered and if he got volunteers, that would be fine, but if he did not, those two needed to be there. Garcia spoke to both separately, telling them he was going to seek volunteers, but they should be prepared if he couldn't find any. It seems that this was the first time Garcia had faced this type of scheduling problem.

Vazquez heard of the search for volunteers and knew that Perez had been seeking some extra work. On Friday, he alerted both Garcia and Perez who then had at least two conversations about working the inventory.

Those conversations principally dealt with the childcare problem which Perez would have to overcome if she were to work the hours required by the inventory. At that time Perez had three small children at home, the eldest being the kindergartner. The children's maternal grandmother who had been watching the children was scheduled to return to Mexico that afternoon and Perez' husband usually worked in the afternoons. The obvious problem was finding someone to baby-sit. She describes the first conversation which occurred about 12:30 p.m. Garcia initiated it by asking:

> "Would you like to work in the inventory as a volunteer?"
>
> Q. (By Mr. RUBIN) How did you respond?
>
> A. I told him, "Ismael, my mother is going to go to Mexico as soon as I leave work. She is just waiting for me. But if you give me a chance to make a phone call and call home and see if my husband is there and he can take care of the kids. So he said, "Yes, okay, make a phone call after the 3:00 o'clock bell."
>
> Q. Do you recall what else, if anything, was said?
>
> A. No, I don't.
>
> Q. Do you recall if anything was said about "voluntary"?
>
> A. Yes, as I said before, he asked me whether I wanted to work as a volunteer.

Rather clearly, the first conversation concerned the Friday afternoon inventory work. Nothing was said about the Saturday work. Like the first, the second conversation was in Spanish. It occurred about 3 p.m. shortly after the regular shift ended. Garcia opened the discussion by speaking across some tables to Perez. He asked:

> [WITNESS PEREZ] "What happened did you talk—did you call home?" But my mother—and I told [him]

[18] Assuming the employee was not protected by the Family Medical Leave Act which does not apply until the employee has been employed for a year.

[19] A calculation Perez says was never explained to her.

that my mother said that she was ready to go on to Mexico and that my husband had not gotten home yet so I'm not going to be able to stay, I'm going to have to go.

Then he asked me, "Are you going to be able to come tomorrow?" And I said, "Ismael, let me speak with my neighbor and ask her if she can take care of my kids. And if she can take care of them, yes, I can come in. But if she cannot look after them, I'm not going to be able to come." And then he said, "Well, fine then."

But then he asked me again, "Are you sure you're going to come?" And I answered, "If my neighbor can look after my kids I surely will come in. If she cannot look after them then I can't come in because I can't leave them alone." And then said, "That's fine. Okay." And I asked him, "In case I can come in tomorrow, is it at 6:30?" He said, "Yes, at 6:30." Then I returned to my work area.

Garcia did not obtain any replacements for Chavez and Valencia for Friday evening; neither did he direct them to work when Perez opted out despite the instructions given him by Halifax that the two were to work if replacements could not be found. In fact, he had told Halifax earlier in the afternoon that Perez would work the inventory if she could resolve the child-care issue. After she told him that the problem could not be resolved, Garcia also reported her Friday unavailability to Halifax. He also told Halifax that Perez would be available for Saturday.

Garcia denies that Perez ever told him that the babysitting issue was a problem on Saturday and also denies that she used any conditional language concerning her need for a babysitter. He says if she had done so, he would have honored the condition.

In fact, he says that their first conversation about Perez doing inventory work was at 10 a.m. on Friday. "I approached her to verify if she was going to work Friday and Saturday." She said "yes." According to him, it was not until the afternoon that she said she might have some babysitting problems. His point is, however, that as early as 10 a.m. on Friday she had "committed" to working on Saturday, even though he agrees with her version concerning the Friday afternoon work. He said, "She didn't have any issues or any other concerns about not showing up on Saturday, so I was expecting her to be at work on Saturday . . ." At one point in his testimony when answering a hypothetical question from counsel for the General Counsel, he acknowledged that if Perez had called him on Friday night to explain that she couldn't come in because of babysitting problems, he said her absence would have been considered excused. Later, he repudiated that answer, saying that once she had committed, an absence for any reason would be considered unexcused. He explained that his earlier testimony was because he had become tired and was confused and had simply given an incorrect answer.

In support of his testimony that Perez had committed herself to Saturday work, Respondent offered the testimony of Rosetta Reeves née West. Her testimony was that she was present during the post-3 p.m. conversation between Perez and Garcia. She was one of three persons who may have overheard the colloquy. In one sense, she corroborates Perez, because she recalled, as Perez testified, that Perez had verified the reporting time of 6:30 a.m. ("She asked when she was supposed to be there the following morning and he told her 6:30.") Yet much of the conversation was in Spanish, which she does not understand. She says that Garcia commonly translates the Spanish words into English when there are nearby English-speakers. Even so, her suggestion that she didn't hear any translation concerning Perez conditioning Saturday work on getting a babysitter does not convince me that Perez didn't impose such a condition. [MR. NAGY: Was there anything else that you overheard during that conversation that you understood? WITNESS REEVES: Well, no.] Indeed, on cross she conceded "a good portion of the conversation was in Spanish" and that most of it preceded the reference to the start time. Moreover, Garcia would be unlikely to translate what Perez said, though he might translate his own remarks. Accordingly, I give Reeves's testimony little weight.

On Friday after work, Perez did check with her neighbor, Erma Simmons, and learned that she would not be able to take care of the children. Perez did not attempt to contact Garcia because she knew she had told him that she would come in on Saturday only if a sitter had been obtained and that she had twice explained it to him. Moreover, the same problem had not been overcome on Friday and she knew he was well aware of her personal situation, including the fact that her mother was no longer available and that her babysitting situation had become more complex. From her point of view, the matter had been fully explained to Garcia and he could not have misunderstood. Second, she really had no way to reach Garcia that evening even if she had thought it appropriate. And, as a relatively new employee, she didn't know that the telephones were answered on Saturdays during inventory. She knew that the Company was closed Saturdays and the receptionists weren't there. In any event, from her perspective, no calls were necessary. She knew she had not irrevocably committed to work that day.

On Saturday, consistent with her understanding, Perez did not go to work. Garcia says he considered her absence to be unexcused and that he immediately advised Halifax. Halifax actually denies that Garcia told him of Perez' absence, saying he had drawn a deer tag and was deer hunting that Saturday. He says it was Monday morning when he learned Perez had not worked the inventory.

Before the beginning of work on Monday, November 1, Garcia advised Human Resources Manager Freeman[20] that Perez had missed her inventory assignment on Saturday. He told Freeman that Perez had had 10 absences and that this was her 11th. He wanted Freeman to be certain that everything was in order for a discharge. Freeman went through the list of absences, and agreed with Perez that discharge was appropriate. No discharge slip was prepared at that stage.

[20] Since Halifax had not attended the inventory, I credit his version over that of Garcia, meaning that Garcia did not tell Halifax about Perez' supposed unexcused absence until early Monday. Therefore, I accept Halifax's testimony that Garcia came to him that morning with the claim that Perez had skipped Saturday work, that discharge was warranted and that Halifax referred him to Freeman. Freeman, as the HR manager, was obligated to review the circumstances before the discharge could be implemented.

Garcia immediately went to Perez' station to await her arrival at 6:30. She describes what happened:

> [WITNESS PEREZ] I got there to my table and Ismael Garcia called me over with a sign [signal] and told me to go with him.
>
> Q. [BY MR. RUBIN] Where did you go with Mr. Garcia?
>
> A. Over there to that corner where he was standing.
>
> Q. What was said at that time?
>
> A. And Ismael Garcia asked me why I hadn't shown up for work on Saturday.
>
> Q. What did you say?
>
> A. And I say, "Ismael, because my neighbor had to work and she wasn't able to watch my kids." And he said, "You gave me your word that you would come." And I said, "No, I told you that if she could take care of my kids I would come, but if she couldn't, I wouldn't." And he said, "You gave me your word and that's then your eleventh fault and therefore you are fired."
>
> And I asked him, "Why? You knew that it was likely that I wasn't going to be able to come on Saturday. You had agreed to that." He said, "Well, that's all I have to say, you're fired."

She told him that it was an injustice, picked up her bag and headed to the office to see Freeman. She spoke to Evelyn Sanders, one of the office specialists. The other, Emma Fregoso[21] was not there, according to Perez. Fregoso was the office specialist who spoke good Spanish and Perez preferred dealing with her. She asked to speak to Freeman and Sanders told her to wait. At that moment Garcia arrived and told her that if she wanted to speak to Freeman they would see him together. She bristled saying, "I don't want to go talk to him with you because you're going to give him your version only." At that point Sanders returned saying "Freeman was too busy and he didn't have any time to waste on me." In response, Perez demanded something in writing explaining the reason for the discharge. Within moments Sanders gave her a termination notice. There is some disagreement concerning whether or not Halifax's signature was on her copy (Perez says it wasn't on the form given her, though it does appear on the copy received in evidence, GC Exh. 17). Nevertheless, Garcia did sign the one given to Perez. It is not necessary to determine when Halifax signed. The slip lists as the reason for the termination: "Exceeded attendance policy absences." It also says, incorrectly, that the day of the discharge was October 29, the preceding Friday. The discrepancy has not been explained on the record.

5. Analysis and conclusions concerning Perez' discharge

Based on the foregoing facts, I conclude that the General Counsel's 8(a)(1) concerted activity allegation case concerning Perez' discharge has been proven, but that the 8(a)(3) union activity case has not.

With respect to the latter, there are significant elements of the prima facie case missing. First, and foremost is the fact that there is really no proof of union animus. Respondent has not been found guilty of any unfair labor practice save the refusal to bargain in order to test the Board's certification of representative. The issue presented (union photography during the election) in the representation case is legitimate and, despite the Board's eventual dismissal of the objection, cannot be dismissed as legally frivolous or as a delay tactic. Respondent certainly did not know the Board would take over 4 years to decide the objection. The only two items which might be evidence of animus have been dismissed on 10(b) grounds, but even if found to be factually accurate background they would not be very persuasive of animus connected to Perez' discharge. They are the claim that Respondent solicited grievances in a meeting after the certification had been issued and a threat of job loss in the context of responding to employee talk concerning a strike.

The first was simply a corporate vice president's reference to the existence of the so-called "concern policy," a policy which is found in the employee manual. That remark is nothing more than a reference to a preexisting policy whereby employees can utilize a procedure to be heard about problems. Certainly, unlike the preelection tactic of soliciting grievances in order to demonstrate to voters that a union is not needed to resolve grievances, this reference promised nothing. Furthermore, there is no suggestion that he was attempting to undermine the certification by directly bargaining with employees. He did know that some employees would be unhappy with the decision to challenge the certification in the courts. No doubt his reference to the concern process was an effort to sugarcoat that news. It was not an offer to hear and satisfactorily settle employment-based complaints. In the final analysis, it was only a palliative, a reminder to employees that if some problem arose during the period of the certification test, a procedure was in place to deal with it. They need only look to the handbook. However one might view DeLorenzo's reference, it was not a remark evidencing the sort of animus needed to support a union-based discharge.[22]

The second was first line supervisor Gesquiere's apparent taunt to an unknown employee who was muttering about striking as a response to DeLorenzo's announcement that the certification would be challenged. Employee Albert Gutierrez says Gesquiere responded with something to the effect: ". . . why don't you guys do that? All we have to do is replace you guys." Taking that remark in its firmest sense might well qualify as a threat to discharge strikers instead of a shorthand correct statement of law. Taken at its softest, it would be lawful. I choose to view it as banter. Gutierrez does not suggest that the employee (who he could not identify) was serious about striking, only that he was grumbling. The supervisor's response may easily be seen as repartee. No doubt most of the employ-

[21] I believe the spelling here to be correct and that the variants found in the transcript are erroneous.

[22] Certainly under the Act employees have the statutory right to directly approach their employer concerning the presentation of grievances, so long as any adjustment is not inconsistent with the Union's role or inconsistent with any agreement the Union has made, and so long as the Union is given the opportunity to be present during the adjustment. See Sec. 9(a) of the Act and the provisos thereto. Whether any concern process resolution would have satisfied Sec. 9(a) is purely speculative at this point.

ees and supervisors, after undergoing an election campaign, were aware (probably from both sides) of the rules concerning a company's right to try to operate in the face of a strike and the right to replace strikers with other workers. The *Laidlaw*[23] rule is well engrained now. Furthermore, the remark was aimed at strikers, not conventional workers such as Perez. Finally, there is no evidence that Gesquiere was involved in the Perez discharge or that he, as a first-line supervisor, was even speaking for management, for the decisionmakers, when he made the remark. Moreover, the remark was quite isolated. In a real sense this evidence is neither evidence of union animus nor evidence supporting a union connection to Perez' discharge.

Moreover, other elements are missing as well. There is little more than guesswork insofar as Respondent's knowledge of Perez' union activity is concerned. True, it knew she wore a union T-shirt on a weekly basis. But she was far from alone. A large number of employees did so, as well. In fact her coworker, Vazquez, wore his shirt much more frequently than she. There is no evidence at all that Respondent observed her passing out union T-shirts and caps in the parking lot on two occasions after work. And, there is absolutely no evidence that Respondent was aware that she had been appointed to be one of the Union's quasi-stewards, assigned to report about matters of interest. In fact, there is no evidence that she ever reported such a matter. She was essentially invisible insofar as her union activity is concerned. Indeed, she never testified that any supervisor or manager said anything to her about that role. And, the timing of the discharge occurred more than 2 months after she accepted the post with the Union.

In sum, there is no evidence that her union activity played any role in the discharge.

The same cannot be said for the concerted activity theory. On August 13, she convinced seven refrigeration department employees to join her in signing a statement saying they wanted their supervisor (Garcia) to be replaced. She took it to Halifax, who, seeing a fire, tried to defuse the situation by conducting a short meeting with the signers. During that event he learned that many of them had signed a blank paper (though in fact, they all knew what it was for) and his lack of receptivity persuaded some of them to disown their participation. Nonetheless, he showed it to Garcia, at least once. He undoubtedly told Garcia that Perez was the person who initiated the petition; in any event Garcia saw her signature at the top. Furthermore, Garcia says he saw it shortly before the inventory of October 29–30. He acknowledges that when he saw it, certainly on the first time, that he was "shocked."

Certainly by the time of the inventory Garcia was well aware that Perez had reached the absence limit under the attendance policy. He also knew, at least by Friday afternoon, if not before, that she was having babysitting problems. It was a wonderful opportunity for him to rid himself of someone who had persuaded his own staff to oppose him on competence grounds. Her success in that endeavor was both alarming and fresh in his memory. He did not wish to be victimized by another such cabal. What better way to get even than by taking advantage of the situation?

I do not credit his version that she unconditionally committed to coming to work on Saturday. That is not something she would have done. Her regular sitter, the children's grandmother, had left the country. That was a fact that Garcia knew, and knew it had hamstrung Perez' ability to get the children covered. That Perez would try to get the neighbor, Mrs. Simmons, to babysit is eminently reasonable and there is no doubt in my mind that she told Garcia that she would work only if she could get the sitter.

The situation was perfect for Garcia. If she could get the sitter, Garcia could tell Halifax that he had obtained a fill-in. If she didn't appear for work, he could report that she had failed to show up and claim, credibly, to his superiors that the absence-prone Perez had missed again. He knew Halifax would be both furious and acceptant. It was an easy call. Accordingly, I find Garcia conveniently omitted Perez' conditional offer to work when reporting the facts to his superiors. He clearly caused her discharge.

Moreover, there is no doubt about why. She had engaged in activity protected by Section 7,[24] seeking, together with her coworkers, to have her supervisor replaced. He was the individual who had the most direct impact on their working conditions. The concerted nature is clear as is their protected purpose, mutual aid and protection. As the Board observed in *Hoytuck Corp*. 285 NLRB 904 fn. 3 (1987), ". . . employee Cline's conduct in preparing and circulating an employee petition that complained of the conduct of the Respondent's cook and kitchen supervisor, Whitaker, towards employees and that further sought his discharge is protected activity here because it is evident that Whitaker's conduct had an impact on employee working conditions." Same: *Polynesian Hospitality Tours*, 297 NLRB 228 (1989); *Korea News*, 297 NLRB 537 (1990); *Caterpillar, Inc.*, 321 NLRB 1178–1179 (1996) (vacated as moot, 1998); *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000); and *FiveCAP, Inc.*, 331 NLRB 1165 (2000).

I therefore find that Respondent, acting through Garcia, discharged Perez because she had engaged in the concerted protected activity of seeking to have him replaced.

D. The Alleged Unilateral Changes

Paragraph 7(a) of the complaint alleges that in September 1999 on dates better known to Respondent than to the director, Respondent, "unilaterally increased its production requirements for the [bargaining] unit." The complaint essentially asserts that Respondent has increased what the General Counsel now calls "production quotas" since the issuance of the certification of representative to the Union in August. Unilateral changes of this sort, occurring at a time when a labor organization has become the employees' exclusive collective-bargaining agent, constitute a refusal to bargain and are barred by Section 8(a)(5) since they affect employee working conditions, a mandatory

[23] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970); the rule derives from *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938).

[24] Sec. 7 of the Act states in pertinent part: "Employees shall have the right to engage in . . . concerted activities for the purpose of . . . mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . ."

bargaining subject. See generally, *NLRB v. Katz*, 369 U.S. 736 (1962).

The principal problem with the word "requirements" or its near-synonym "quota" is that the General Counsel's definition doesn't really match what Respondent does. There is no individual requirement or quota, although there is a monthly plan for each department or work cell. That target may or may not be reached during the month. Furthermore, the target takes into account several factors, including the number of workdays in the month, the normal number of employees in that work area devoted to the product, and the normal time it takes for a proficient employee to complete a unit of work.

This lack of understanding has caused the General Counsel some difficulty in establishing a baseline to determine what changes, if any, have occurred beginning in September concerning the production requirements. Respondent contends that no changes were made whatsoever, while the General Counsel points to some numbers comparing the August plans with those made for September.

The document on which both rely is the monthly manufacturing report, in evidence as General Counsel Exhibit 19. This document consists of one page for each month of 1999. It is actually created after the month is over, but it does set forth the number of units planned for that period. It tracks production for about 19 departments as well as cost information for 10 others. The document is not instantly understood as it contains a great deal of information. In most respects, it is a tool for management to determine the current state of affairs. It does not track any particular employee (unless there is a one person department) nor does it define a unit of work as that varies from department to department. Furthermore, if a department is subdivided into different tasks, the document does not differentiate one task from another. An easy example is the plate chilling department which normally has two employees, each of whom did something different. Vazquez assembled the frame and sides while Perez installed the compressor.

In addition to the above relatively stable factors, there is a question of sales success, i.e., the number of orders needed to be filled. Obviously, the number varies from month to month and even if there is a way to forecast the number of orders, it is problematical at best. Moreover, in some months certain products are in higher demand than others. That difference might entail adding or subtracting employees or man-hours from each department as individuals get moved about the plant to fill in as needed.

Respondent has sought to smooth out this landscape by making an educated guess each month to determine what would be expected of each department. That number is the "planned unit" column in the "planned capacity" section of the report. It is the closest item of evidence which approximates "requirements" or "quotas." A review of the monthly reports shows a range of numbers for each department. I have examined for the purpose of this decision, the major departments and have determined the range for the 8 months ending on August 31 and for the 4 months beginning September 1. As might be expected, planned output and actual output are often different. The exhibit does show actual output, but those figures are not relevant to the issues presented and are omitted here.

The chart below shows the pre and postcertification planned unit numbers. The final number in the first 8 months column is for August; the initial number in the last 4 months column is for September. It is true, as the General Counsel notes, that a comparison of the August and September planned units shows an increase for September.[25] On the other hand, neither the September numbers nor those found in the succeeding 3 months are significantly different from those of the first 8 months. The range appears to be the same throughout the year. Indeed, the only numbers in the last 4-month column which is outside the range established in the first 8 months is September's 71 found in Plate Chiller and the 252 found in Sidemount Assembly for November. Neither of those seems particularly remarkable in the overview.[26]

	Planned Units first 8 months	Planned Units last 4 months
Backmount Assembly	500, 500, 650, 440, 440, 570, 380, 360	530, 400, 252, 420
Sidemount Assembly	192, 194, 248, 200, 200, 250, 190, 180	250, 200, 252, 210
HFT Assembly	204, 209, 223, 140, 140, 185, 57, 90	136, 100, 242, 420
BC/DC Assembly	86, 112, 140, 115, 115, 143, 105, 99	132, 110, 99, 116
Waterstation Assembly	160, 160, 200, 160, 160, 200, 152, 144	192, 160, 144, 168
Beer Cooler	86, 112, 140, 115, 115, 143, 105, 99	132, 110, 99, 116
Reach-In Assembly	220, 220. 275, 240, 210, 260, 152, 144	200, 160, 144, 168
BM Refrigeration	220, 500, 625, 500, 500, 625, 380, 360	525, 400, 252, 420
SM Refrigeration	192, 194, 248, 200, 200, 250, 190, 180	250, 200, 180, 210
RI Refrig	220, 220, 275, 240, 210, 260, 152, 144	200, 160, 144, 168
Tops	778, 806, 1038, 775, 755, 963, 675, 639	912, 710, 531, 746

[25] The General Counsel's chart on p. 16 of its brief is most misleading as it omits the first 7 months of the year. It cannot be argued in good faith that August figures alone establish the normal range of expected production.

[26] Dough roller assembly has been omitted, being a one-person department, and Doors has been omitted as, according to Halifax, those entries on the document appear to contain errors.

Plate Chiller	52, 54, 68, 54, 54, 68, 57, 54	71, 60, 54, 63

Virtually all of the postcertification plans are within the precertification ranges. Since the evidence establishing a significant baseline is not very strong, and since there is really no evidence of any significant departure from the ill-defined one which can be discerned, I am unable to conclude that the General Counsel has established that any change has occurred, much less a change of the magnitude cognizable by the *Katz* rule. More specifically, see *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976). Accordingly, paragraph 7(a) of the complaint will be dismissed.

REMEDY

Respondent having discriminatorily discharged Perez will be ordered to offer her immediate reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, Respondent shall be required to expunge from Perez' personnel file any reference to her illegal discharge. *Sterling Sugars*, 261 NLRB 472 (1982). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practice which has been found.

Based on the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers' International Association, Local No. 359, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. On November 1, 1999, Respondent violated Section 8(a)(1) of the Act when it discharged its employee Luz del Carmen Perez.

4. The allegations set forth in paragraph 9(b) and (c) of the complaint are barred by Section 10(b) of the Act.

5. The General Counsel has failed to prove any other allegation of the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Randell Manufacturing, Inc., Tucson, Arizona, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees who engage in activity for their mutual aid and protection, such as joining with other employees to ask that their supervisor be replaced.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Luz del Carmen Perez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Luz del Carmen Perez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the Remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Perez' unlawful discharge, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its manufacturing plant in Tucson, Arizona, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted (in both English and Spanish) by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since November 1, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated: San Francisco, California. June 5, 2001

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees who engage in activity for their mutual aid and protection, such as joining with other employees to ask that their supervisor be replaced.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Luz del Carmen Perez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Luz del Carmen Perez whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Luz del Carmen Perez and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

RANDELL MANUFACTURING OF ARIZONA, INC.